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SUPREME COURT, U.S.

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No. A-982

IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM
1982

DEV KINNEY d/b/a MEDIA GRAPHICS
Appellant, Defendant, CounterPlaintiff

v.

KOTLER EXTERMINATING COMPANY, INC.
Appellee, Plaintiff, CounterDefendant

APPEAL AS OF RIGHT TO THE U.S. SUPREME COURT
FROM THE
SUPREME COURT OF TENNESSEE

JURISDICTIONAL STATEMENT

John D. Kinney
717 Spring St.
Memphis, TN 38112
P.O. Box 11502
Memphis, TN 38111
Pro se

QUESTIONS PRESENTED

Whether a State Court of Appeals is bound to uphold a jury verdict resulting from a tort by a municipality within that State.

TABLE OF CONTENTS

Questions Presented.....Page 1

Table of Authorities.....Page 1

Constitution, Statutes and Regulations.....Page 2

Statement of the Case.....Page 2

Statement of the Facts.....Page 3

Argument in Brief.....Page 4

Petition for Oral Argument.....Page 6

In Forma Pauperis, Certificate of Service for Appeal & Motion.....Page 6

Appendix, documents listed.....Page 7

Motion to Justice O'Connor.....(Attached)

TABLE OF AUTHORITIES

Palko v. Connecticut, 302 U.S. 319, 224 (1937)

DaJonge v. Oregon, 299 U.S. 353, 364

Thomas v. Collins, 323 U.S. 516, 530

Maxwell v. Dow, 176 U.S. 581

CONSTITUTION, STATUTES AND REGULATION

U.S. Constitution, Amendments:

> Article V, "No person shall...be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."
>
> Article XIV, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A complaint was filed for Kotler Exterminating Company by Attorney David Caywood on April 17, 1979. The complaint alleged that Dev Kinney d/b/a Media Graphics was in breach of contract and should repay $2,000.00 that Kotler had paid to Mr. Kinney under contract (Trial Exhibit 1). In addition, the Plaintiff sued for $25,000.00 in damages and called for a jury. The complaint was assigned to Division IV for the fifteenth judicial district at Memphis.

The complaint was answered and a counter-complaint was filed by Dev Kinney d/b/a/ Media Graphics pro se May 24, 1979, in which Kotler was accused of falsely entering into contract and causing delay and refusing to pay for all work completed. Mr. Kinney sought $2,665.00 and $60,000.00 in damages. Answer to the counter-complaint was filed by Kotler's attorney dated June 22, 1979.

The case was heard on October 22, 1980 and a judgement was rendered in favor of Kotler Exterminating Co., Inc. for $2,600.00 on October 23, 1979.

Motion for a new trial was entered on December 2, 1980 and denied by Judge Strauch on December 18, 1980.

Notice of Appeal was filed by Dev Kinney d/b/a Media Graphics pro se on January 15, 1981.

Larry B. Creson, who represented Mr. Kinney during trial, filed for withdrawal on March 20, 1981.

An appeal to the Court of Appeals of Tennessee, Western Section at Jackson was entered June 12th, 1981 and the judgment of the trial court was affirmed Nov. 30th, 1981. Oral argument was not allowed because Kinney filed Appeal pro se and did not know to request oral argument. The Federal question of Due Process of Law was inadequately argued in brief.

Kinney filed an Application for Permission to Appeal with the Tennessee Supreme Court on Dec. 28th, 1981 and again raised the Federal question of Due Process of Law in a memorandum filed Jan. 30th, 1982. Permission to Appeal was denied Feb. 16th, 1982, This judgment is being appealed.

STATEMENT OF THE FACTS

On February 6th, 1979 Kotler Exterminating Company entered into an agreement with Dev Kinney d/b/a Media Gra for a sales brochure. A contract, made out to Kotler Exterminating Co., Inc. / Cine Art (Cine Art was Kotler's Advertising Agency) was signed by Mr. Kotler, general manager, whereby Kotler agreed to pay Dev Kinney d/b/a Media Graphics $7,260.00 for "comprehensive design and finished art," (trial exhibit 1) with payment to be made as follows: $2,000.00 immediately upon consignment, with balance due 30 days after final invoice. The

contract also bore the name of Ralph Chandler, owner of Cine Art and Mr. Kotler's advertising agent, but was marked over by Mr. Kotler. The contract specified a delivery date of March 10th, 1979 provided material needed for completion was not delayed through fault of Media Graphics. The work was not completed on March 10th. On March 27th Mr. Kinney received a registered letter from Mr. Kotler dated March 14th telling him to stop work. On March 31st, Mr. Kinney sent an invoice for all work done until work stoppage. On April 17th, Mr. Kotler filed suit for return of the $2,000.00 consignment fee and $25,000.00 in damages, calling for a jury. Mr. Kinney counter-sued for the final invoice in the amount of $2,265.00 plus $60,000.00 damages, claiming fraud and breech of contract by Kotler. During trial Kotler supposedly changed his plea to include an additional $600.00 paid by advertising agent Chandler to Mr. Kinney under a previous contract. The jury found in favor of Kotler in the amount of $2,600.00 even though the trial judge refused to allow the previous contract to be entered in evidence or shown to the jury.

ARGUMENT IN BRIEF

Articles V and XIV of the Amendments to the Constitution of the United States of America afford Dev Kinney d/b/a Media Graphics protection from conspiracies and torts designed by parties within individual States to remove and jeapordize his property, his good name, his family and his standing in the community.

The Federal question of fraud under contract in violation

82 5179

of the Universal Commercial Code was raised by Mr. Kinney in the original Answer and Counterclaim filed pro se on May 24th 1979. This claim was never put to the jury because all such attempts were denied by the trial judge. The case was so distorted that Mr. Kinney's Lawyer at trial filed a motion for a new trial directly in contradiction to the printed transcript later produced for Appeal.

Threats to the life of Mr. Kinney and his family were not allowed into the record of the case on Appeal to the Tennessee Court of Appeals. The only testimoney allowed was the obviously biassed testimony of persons in the employ of Kotler Exterminating Company.

These facts were presented to the Supreme Court of Tennessee in a Memorandum dated Jan. 30th, 1982. The Court denied a full hearing on the matter even though obvious injustice was apparent at trial level, and even though the Supreme Court of the United States has ruled that trial juries are not required in Civil jurisdiction. (See authorities) The authorities cited at the forward of the Appeal will bear this out. It shall be shown to the Court, should Mr. Kinney be able to angue this case, that the jury was intimidated by the obvious bias of the trial judge and the attitude of Kinney's own lawyer at trial against the cause of Kinney's case, and that the jury could not and did not render a just verdict. Furthermore, the facts relating to matters of tort and fraud were appealed to the highest Courts in Tennessee without avail. The contention here is that full hearing should have been given all matters.

82 5179

PETITION FOR ORAL ARGUMENT

To adequately show that the injustices done to Appellant-Defendant Kinney were in direct violation of his constitutional rights and that just relief from such violation was denied by those acting for the people of the State of Tennessee, oral argument is sought in this matter.

PAUPER'S OATH

I, John D. Kinney, do solemnly swear that I am a resident of the State of Tennessee and that owing to my poverty, I am not able to bear the expense of the action which I am about to commence and that I am justly entitled to the relief sought under the Constitution of the United States.

John D. Kinney

John D. Kinney pro se

State of Tn.
County of Shelby

Sworn to and subscribed before me this the 30th day of July, 1982.

Evelyn J. Holland, Notary Public

MY COMMISSION EXPIRES MAY 17, 1985

CERTIFICATE OF SERVICE

I, John D. Kinney, acting pro se for Dev Kinney d/b/a Media Graphics have mailed by first class U.S. postal service, pre-paid, a true copy of the foregoing Appeal to David E. Caywood, attorney for the Appellee, at his address at 2800 Sterick Building, Memphis, TN 38103. This the 31st day of July, 1982. The attached motion was mailed on the same day.

John D. Kinney

John D. Kinney pro se
717 Spring St.
P.O. Box 11502
Memphis, TN 38111

APPENDIX

Containing the following:

* Opinion of Tennessee Court of Appeals, Western Section, at Jackson

* Judgment of Tennessee Supreme Court

* Notice of Appeal to U.S. Supreme Court

* Motion for New Trial by trial attorney with special reference to section 8.

* Application for Permission To Appeal to Tennessee Supreme Court

* Order by Tennessee Court of Appeals

* Memorandum on Motion to Dismiss Application

* Application to Complete Original Application to Tennessee Supreme Court

FILED
NOV 30 1981
JEWEL REDDEN, CLERK

KOTLER EXTERMINATING CO., INC.,

Plaintiff-Appellee

VS.

DEV KINNEY, d/b/a
MEDIA GRAPHICS,

Defendant-Appellant

SHELBY LAW

COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

APPEALED FROM THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE

HONORABLE IRVING M. STRAUCH, JUDGE

FILED: NOV 30 1981

DAVID E. CAYWOOD
PICARD, CANALE, CAYWOOD, LUCAS & WATSON
Suite 2800, Sterick Building
Memphis, Tennessee 38103
ATTORNEYS FOR PLAINTIFF-APPELLEE

JOHN D. KINNEY, Pro Se
717 Spring Street
Memphis, Tennessee 38112
ATTORNEY FOR DEFENDANT-APPELLANT

THOS. A. SHRIVER
SPECIAL JUDGE

AFFIRMED

KOTLER EXTERMINATING CO., INC.,
Plaintiff-Appellee

VS.

SHELBY LAW

DAVE KINNEY d/b/a
MEDIA GRAPHICS,
Defendant-Appellant

OPINION

- THE CASE -

This is a suit by plaintiff for return of $2000.00 paid in advance for work to be done by defendant pursuant to terms of a contract entered into by the parties, and for $25,000.00 damages for breach of said contract.

By counter-suit defendant, counter-plaintiff, prays for judgment against Kotler in the sum of $2,665.50 and attorney fees for work done, plus damages of $60,000.00.

The case was tried before the Judge and a jury resulting in a verdict and judgment in favor of plaintiff, Kotler Exterminating Co., for $2,600.00 and against defendant, Kinney in both the suit and counter-suit.

From the verdict and judgment, Kinney appealed after his motion for a new trial was overruled.

- THE PROCEEDINGS BELOW -

The original complaint filed by Kotler Exterminating Company, Inc., alleges and the record shows that the parties entered into a contract dated February 6, 1979 whereby defendant was to provide certain services consisting of the production of a color brochure which plaintiff was to use in advertising and promoting the sale of its services; that the contract required defendant to present the brochure ready for printing, in condition known as "camera ready", on or before March 10, 1979 since plaintiff's main promotional efforts were begun about the first of April each year when insects and termites become active, these facts being well known to defendant.

It is further alleged that the material was not ready on March 10, 1979 and that defendant then advised plaintiff that it would not be ready until around June 1, 1979, which would cause plaintiff to lose a critical period in which to promote its product and services; that time was of the essence under the contract, as defendant well knew. It is further alleged that defendant then advised plaintiff that he, defendant, was not required to write the copy for the brochure which position of defendant is clearly contrary to the provisions and clear intent of the contract.

The contract is made exhibit to the complaint.

Plaintiff sues for recovery of $2,000.00 which was paid defendant in advance and for $25,000.00 damages, all because of defendant's breach of the contract.

Defendant filed his answer and counter-complaint admitting the execution of the contract but denies the breach of same by him and denies plaintiff's right to recover. By counter-claim it is asserted that plaintiff did, on or about March 14, 1979, announce his intention to unilaterally alter the conditions of the contract. Upon receipt of counter-claimant's response plaintiff sent a registered letter which was a work-stop order.

It is alleged that plaintiff's actions damaged defendant's professional integrity and reputation resulting in damages in excess of $60,000.00 hence, he seeks recovery of $2,665.50 for work and expenses plus $60,000.00 damages.

The Answer to the Counter-Claim joins issue on the material allegations therein.

The case was tried to a jury, and in his charge the Court designated the original complaint as Case No. 1 and the Counter-Claim as Case No. 2.

The verdict and judgment is as follows:

JUDGMENT

"This cause came on to be heard before the Court and Jury, to-wit: Donna M. Morris, Erma M. Warren, Joyce M. Scott, Mildred Nelson, Milton E. Gill, Nina R. Roberts, Ruth H. Wall, Jerome R. Flowers, George L. Chatman, Kenneth D. Thomas, Vernon J. Dods, and Ricky Crump, and the Jury render the following verdict:

> We, the Jury, find in favor of Plaintiff #1 Kotler and award damages in the amount of $2,600.00.
>
> V. J. Dodd

"We, the Jury, find in favor of Defendant in Case #2.

V. J. Dodd

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff, Kotler Exterminating Company, have and recover from the Defendant, Dev Kinney d/b/a Media Graphis (sic), the sum of Two Thousand, Six Hundred ($2,600.00) Dollars, and the Counter-Complaint filed by Dev Kinney d/b/a Media Graphics against Kotler Exterminating Company be and the same is dismissed with prejudice.

"The costs are hereby adjudged against the Defendant and Counter-Plaintiff, Dev Kinney d/b/a Media Graphics, for which let execution issue.

/s/ Irving M. Strauch
JUDGE

ENTERED: 11-4-80

The Motion for a New Trial was overruled, whereupon defendant-counter-claimant, perfected his appeal to this Court.

- ISSUES ON APPEAL -

Counsel for Appellant states the issues as follows:

"1. Whether the verdicts of the jury in the suit and counter-suit were supported by the evidence.

2. Whether the court erred in not permitting defendant-counterplaintiff to present material evidence as to the meaning or understanding upon which the contract was based.

3. Whether the court erred in not permitting defendant-counterplaintiff to present material eviden of fraud and delay on the part of plaintiff-counter-defendant.

4. Whether the court erred in instructing jury that defendant-counterplaintiff pleaded that time was not of the essence."

- THE FACTS, THE LAW AND OUR CONCLUSIONS -

There is no dispute as to the fact that the parties entered into a written agreement, Ex. to the complaint and counter-complaint, dated February 6, 1979 whereby appellant would provide Appellee with a brochure, the contract price being $7,260.00 of which $2,000.00 was advanced as an initial payment.

Pertinent provisions of the contract are

"I. Services and Work Description. Process Color Brochure Package with two color contracts and single-copy duplicates, and warranty card, 'Pest Protection Plus' Theme.

"IV. Completion.

Final completion date shall be no later than March 10, 1979 from our receipt of signed acknowledgment; provided, however, that should any special order material required for completion be delayed in shipment to us through no fault of our own, then completion date shall be automatically extended accordingly."

Appellant did not have the work completed by March 10, 1979 and Appellee terminated the contract.

A dispute arose, however, when Appellant alleged that he was not required by the contract to furnish the "copy" of material in preparation of the brochure, and, further, that the deadline for providing the "camera ready" material was voluntarily extended by plaintiff. Both of these issues were contested.

[page 2 of 3]

David Kotler, Chief Executive Officer of plaintiff, and Judy Durham, his office manager, both testified that there was no agreement that appellant was not to write the copy and that in fact, they furnished appellant with material to use in writing the copy and explained to him the necessity for the March 10, deadline.

Appellant asserted that Chandler, on behalf of Kotler, was to write the copy but this was denied by Mr. Kotler and his office manager and by Chandler who also denied the assertion by appellant that he, Chandler, was at a meeting with Kotler and himself when the March 10 deadline was

Issue No. 1, whether there is evidence to support the Jury Verdict, must be resolved against the contentions of Appellant.

As was said in City of Columbia vs. Lentz, 39 Tenn. App 350, 282 S.W.2d 787, "where there is no error of law, we cannot disturb the Verdict if there is any material evidence to support it". See also Rose & Co. vs. Snyder, 185 Tenn. 499, 206 S.W.2d 897 and many cases.

As to Issue No. 2, whether the Trial Judge erred in not permitting defendant to present evidence as to the meaning or understanding upon which the contract was based, the law in Tennessee is well settled that unless the language of the written agreement is ambiguous testimony may not be introduced to change, explain or vary the terms thereof. The contract

involved in the case at bar is expressed in plain and unambiguous language.

In the early case McGannon vs. Farrell, 141 Tenn. 631, the statement of the law which has been restated in numerous subsequent decisions was: "Generally parol evidence cannot be received to vary, contradict, add to or subtract from the terms of a written contract".

In Petty vs. Sloan, (Tenn) 277 S.W.2d 355, it was said: "If a contract is plain and unambiguous the meaning thereof is a question of law, and it is the Court's function to interpret the contract as written, according to its plain terms".

We find no error in the action of the Court with respect to this issue.

As to Issue No. 3, whether the Trial Judge was in error in not permitting defendant to introduce proof of fraud and delay on the part of Kotler, it appears that the question raised here was rather thoroughly explored at the trial by defendant's testimony and that of his witness, Chandler, who did not help him by his testimony. The client/contractor's responsibilities are set out in the written agreement, and the attempt by defendant-appellant to go outside the contract and impose duties on Kotler not imposed by the agreement, was properly denied by the Court.

Considering the terms of the contract and the issues made by the pleadings, we think the Trial Judge did not err in his rulings on this question, hence, Issue No. 3 is resolved adversely to appellant.

As to Issue No. 4, whether the Court erred in instructing the jury that Defendant-counter-plaintiff pleaded that time was not of the essence, when the pleadings are considered along with the position taken by defendant-counter-claimant at the trial, it might well be concluded that he was maintaining that time was not of the essence in the performance of the contract. However, even if the instruction complained of be regarded as incorrect, it was, at most, harmless error.

Furthermore, appellant did not make a special request for clarification, or make any objection to the charge at the time of trial or in his Motion for a New Trial.

Issue No. 4 is resolved against appellant's position.

It results that the judgment of the Trial Court is affirmed with costs.

Affirmed.

Thos. A. Shriver

THOS. A. SHRIVER, SPECIAL JUDGE

WE CONCUR

Summers

SUMMERS, JUDGE

Dowlin

DOWLIN, JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FILED

FEB 16 1982

JEWEL REDDEN, CLERK

KOTLER EXTERMINATING CO., INC.,

Appellee

vs

SHELBY LAW

DEV KINNEY, d/b/a MEDIA GRAPHICS,

Appellant

IN RE: APPLICATION FOR PERMISSION TO APPEAL OF DEV KINNEY, d/b/a MEDIA GRAPHICS

Upon consideration of the application for permission to appeal of Dev Kinney, d/b/a Media Graphics, the answer of Kotler Exterminating Co., Inc., the opinion of the Court of Appeals and the record in the cause,

Permission to appeal is denied at the cost of appellant.

PER CURIAM

IN THE SUPREME COURT OF THE
STATE OF TENNESSEE

DEV KINNEY d/b/a
MEDIA GRAPHICS
Appellant/Defendant/
Counter-Plaintiff

Vs.

KOTLER EXTERMINATING CO.,
INC.
Appellee/Plaintiff/
Counter-Defendant

SHELBY LAW NO. 58

FILED
FEB 26 1982
JEWEL REDDEN, CLERK

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Appellant above named hereby appeals to the Supreme Court of the United States of America from the final judgment of The Supreme Court of Tennessee concerning the inadmissability of Appellant's right to appeal, such judgment being rendered on February 16, 1982. This appeal is taken persuant to #28 U.S.C. #1257(2).

Respectfully submitted,

John D. Kinney, Pro Se

John D. Kinney

717 Spring St.
Memphis, TN. 38112

Mailing Address:
P.O. Box 11502
Memphis, TN 38111

IN THE CIRCUIT COURT OF TENNESSEE DEC2 - 1980
FOR THE FI EENTH JUDICIAL CIRCUIT AT EMPHIS
CLERK CIRCUIT COURT

BY D.C.

KOTLER EXTERMINATING COMPANY, Plaintiff and Counter-Defendant vs. DEV KINNEY d/b/a MEDIA GRAPHICS, Defendant and Counter-Plaintiff	NO. 86751-4 T.D.

MOTION FOR NEW TRIAL AND ALTERNATIVE MOTIONS FOR LEAVE TO AMEND AND TO CORRECT JUDGMENT TO CONFORM TO EVIDENCE AS TO AMOUNT

Comes Dev Kinney d/b/a Media Graphics, Defendant and Counter-Plaintiff in the above re cause, and moves the Court, pursuant to Rules 59 and 60, Tennessee Rules of Civil Procedure, to set aside the verdict and judgment in this case, or, in the alternative, to amend the judgment or allow amendment of th pleadings, and to order a new trial. The reasons for such moti are as follows:

1. The verdicts of the jury on both the origina complaint and the counter complaint were not supported by any substantial or reasonable evidence of sufficient weight to support the verdicts rendered.

2. The verdicts of the jury on ho complaint and the counter complaint were against the preponderance of the evidence, and the Court, as thirte juror, should set such verdicts aside and order a new trial.

3. The Court erred in not permitting Dev Kinney d/b/a Media Graphics, the Defendant and Counter-Plaintiff, to present to the jury evidence of the agreement or understanding between the parties as to how the contract in litigation was to be performed, i.e., testimony that Kotler Exterminating Company, th Plaintiff and Counter-Defendant, was supposed to and had agree to make arrangements for Dev Kinney d/b/a Media Graphics, to hol photograph sessions at the premises of clients of Kotler Exterminating Company, and was supposed to make arrangements for the use of personnel of such clients, which Plaintiff and Counter-

Defendant failed to do, thus causing delay in the performance of the contract beyond the time specified therein.

4. The Court erred in not permitting Dev Kinney d/b/a Media Graphics, Defendant and Counter-Plaintiff, to present to the jury evidence to the effect that the failure of Defendant and Counter-Plaintiff to complete the work under this contract by the date stated in the contract was due to the failure and refusal of Kotler Exterminating Company, Plaintiff and Counter-Defendant, to cooperate with and assist Dev Kinney d/b/a Media Graphics, to perform such contract in the manner desired by Kotler Exterminating Company, i.e., testimony that the Kotler Exterminating Company, Plaintiff and Counter-Defendant, had indicated its desire to Dev Kinney d/b/a Media Graphics, that the locations and personnel of clients of Kotler Exterminating Company be used in the photographs in the advertising brochure called for by the contract and that Kotler Exterminating Company did not make the agreed arrangements with such clients, with the result that personnel of such clients did not cooperate with Dev Kinney d/b/a Media Graphics, Defendant and Counter-Plaintiff, and the various photographic sessions had to be rescheduled or took much longer than would have been necessary and were much more expensive, and the entire project was thrown irretrievably behind schedule.

5. The Court erred in not permitting Dev Kinney d/b/a Media Graphics, Defendant and Counter-Plaintiff, to present evidence to the effect that Kotler Exterminating Company, Plaintiff and Counter-Defendant, interfered with and obstructed Dev Kinney d/b/a Media Graphics in the performance of the contract, thus making it impossible to complete the work by the prescribed date, i.e., testimony to the effect that after indicating the desire of Kotler Exterminating Company that the locations and personnel of its clients be used, Kotler Exterminating Company did not make the necessary arrangements for Dev Kinney d/b/a Media Graphics to have access to the necessary premises and locations and did not make arrangements for the personnel of such clients to assist and cooperate with Dev Kinney d/b/a Media Graphics, Defendant and Counter-Plaintiff, with the result that performance of the con-

pleted on time.

6. The Court erred in limiting Dev Kinney d/b/a Media Graphics, Defendant and Counter-Plaintiff's, claim for damages to $2,665.50, rather than allowing the Defendant and Counter-Plaintiff to prove all reasonable incidental and consequential damages resulting from Plaintiff and Counter-Defendant's actions and conduct which interfered with and prevented Defendant and Counter-Plaintiff from performing the contract and providing the materials for the brochure by the date specified in the contract.

7. The Court erred in refusing to consider the Defendant and Counter-Plaintiff's claim for attorney's fees under this contract, which plainly states the right to recover same on the part of the Defendant and Counter-Plaintiff, and in ruling that such fees would have to be passed on by the jury, which action would require the presentation of evidence as to the proper amount of such fees.

8. The Court erred in not permitting Dev Kinney d/b/a Media Graphics, Defendant and Counter-Plaintiff, to present to the jury evidence of the contract between Media Graphics and Ralph Chandler d/b/a Cine Art dated January 29, 1979, while allowing Kotler Exterminating Company, the Plaintiff and Counter-Defendant, to submit to the jury and recover a judgment for the $600.00 specified by the said contract, although the evidence clearly showed that Kotler Exterminating Company had never paid such $600.00, but indeed had refused to do so, and claimed it had no obligation to do so.

9. The Court erred in excluding from consideration by the jury all evidence concerning the agreements and understandings between the parties as to the actual scope of the contract of February 6, 1979 and the method of performance thereof. Such ruling by the Court was based upon the parol evidence rule, upon the grounds that such evidence would contradict and be in conflict with the terms of the written agreement. However, Defendant and Counter-Plaintiff submits that evidence of such understanding and agreement would not be in conflict with the terms of

novation, a subsequent modification of such written agreement, or would have to do with the interpretation of the written terminology of the contract, in all of which cases such evidence would not be in conflict with the written contract and would not be excluded by the parol evidence rule.

WHEREFORE, AND FOR ALL OF WHICH, Dev Kinney d/b/a Media Graphics, Defendant and Counter-Plaintiff, respectfully moves the Court to set aside the verdicts of the jury on both the original complaint and the counter complaint and to order a new trial in this cause.

IN THE ALTERNATIVE, Dev Kinney d/b/a Media Graphics, moves the Court to allow him to amend his pleadings, so as to conform to the evidence presented and to do justice, so that he may be allowed to plead and to offer testimony in support of allegations to the effect that once the contract was entered into, the parties did specify as to just how the contract was to be performed (i.e., use of locations and personnel of the clients of the Plaintiff and Counter-Defendant), so that such evidence would be properly admissible in a whole and complete trial of this case; and, further,

IN THE ALTERNATIVE, and in addition to the above, Dev Kinney d/b/a Media Graphics, moves the Court to reduce the judgment obtained upon the verdict of the jury on the original complaint by the amount of $600.00, which amount it was clearly shown by the evidence, including the testimony of Mr. David Kotler himself, that such $600.00 was never paid by Kotler Exterminating Company and was not acknowledged to be a legitimate obligation of Kotler Exterminating Company.

Respectfully submitted,

DEV KINNEY D/B/A MEDIA GRAPHICS

By: Larry B. Creson, Jr.

Larry B. Creson, Jr.
APPERSON, CRUMP, DUZANE & MAXWELL
2610 - 100 North Main Building
Memphis, TN 38103
901/525-1711

Attorneys for Defendant and
Counter-Plaintiff, Dev Kinney
d/b/a Media Graphics

The undersigned hereby certifies that a copy of the foregoing Motion was served upon David E. Caywood, attorney for Plaintiff and Counter-Defendant, by mailing same to his office at 2800 Sterick Building, Memphis, Tennessee, 38103, by regular United States mail, postage prepaid, this 2nd day of December, 1980.

Larry B. Creson, Jr.

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION, AT JACKSON

APPLICATION FOR PERMISSION TO APPEAL

DEV KINNEY, d/b/a MEDIA GRAPHICS,	:	
Defendant-Appellant	:	
Vs.	:	Shelby Law
KOTLER EXTERMINATING CO., INC.	:	
Plaintiff-Appellee	:	

APPLICATION FOR PERMISSION TO APPEAL

Comes now Dev Kinney, d/b/a Media Graphics, Defendant-Appellant and applies for permission to appeal the above cause for rehearing, persuant to Rule 11(b) of the Tennessee Rules of Appellate Procedure, asking that oral argument be permitted in this hearing, since Mr. Kinney was not notified oral argument had to be applied for pro se prior to notification of the above cause hearing date.

Respectfully submitted this twenty-second day of December, Nineteen Hundred Eighty One by

J.D. Kinney, pro se
Dev. Kinney, d/b/a Media Graphics
P.O. Box 11502
Memphis, TN 38111

Certificate of Service

I certify that a copy of the foregoing was furnished adversary counsel of record by mailing/delivering same to such counsel's business address at 2800 sterick bldg. Memphis, TN 38103.

J.D. Kinney, pro se
717 Spring St.
Memphis, TN 38112

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

FILED
DEC 28 1981
JEWEL REDDEN CLERK

KOTLER EXTERMINATING CO., INC.
Appellee

vs.

DEV KINNEY, d/b/a MEDIA GRAPHICS
Appellant

SHELBY LAW

ORDER

This cause came on to be heard upon Application for Permission to Appeal addressed to the Court of Appeals.

The time for filing a Petition to Rehear in this Court expired on December 10, 1981. This Court will treat this as an Application for Permission to Appeal to the Supreme Court pursuant to Rule 17 of the Tennessee Rules of Appellate Procedure.

It is, therefore, transferred to the Supreme Court.

This the 28th day of December, 1981.

JUDGE

IN THE SUPREME COURT OF TENNESSEE
WESTERN DIVISION

DEV KINNEY d/b/a
MEDIA GRAPHICS

APPELLANT/DEFENDANT,

Vs.

KOTLER EXTERMINATING CO., INC.

APPELLEE/PLAINTIFF.

SHELBY LAW NO. 58

MEMORANDUM TO APPELLANT's ANSWER TO MOTION TO DISMISS

Despite every effort to obtain counsel, Dev Kinney had to file answer to Kotler's suit for $27,000.00 pro se.(see attached exhibits 1,2,3,4,5). After trial, Appellant's Attorney of Record, Larry R. Creason, Jr., simultaneously withdrew from this case and the practice of law as an attorney. Appellant Kinney contends that he only agreed to represent Kinney at trial because he knew that he could not be hurt by the political and economic forces that have combined to deny justice in this matter.

Mr. Creason stated in his motion for a new trial (See transcript, Vol. 1, pg. 27, condition 8) that Appellee Kotler Exterminating Co. was awarded money that Mr. Kotler had refused to pay. This money was paid to Kinney by Mr. Kotler's advertising

agent under the terms of a previous contract that the trial judge refused to admit in evidence. Attorney Creason said in his motion that Mr. Kotler said he did not owe that money and refused to pay it. Yet the trial transcript quoted Mr. Kotler as saying he paid the money. (Vol. II, pg. 67, 13-17) Either the transcript is in error, or Mr. Creason, who is now a Federal Administrative Judge, is in error.

As Appellant Pro Se, and a business man, not a lawyer, I ask the court's indulgence so that the facts of this case will be adequately reviewed. The future of Commerce in our State will depend on your decision.

Respectfully submitted,

John D. Kinney, Appellant Pro Se.

Dev Kinney/Media Graphics, Inc.
717 Spring St.
Memphis, TN 38112
Post Office Box 11502
Memphis, TN 38111
January 30, 1982

IN THE SUPREME COURT OF TENNESSEE
WESTERN DIVISION

DEV KINNEY d/b/a MEDIA GRAPHICS, Appellant/Defendant Counter-Plaintiff	:	
VS.	:	SHELBY LAW NO. 58
KOTLER EXTERMINATING CO., INC. Appellee/Plaintiff Counter-Defendant.	:	

APPLICATION FOR PERMISSION TO APPEAL
TO COMPLETE
APPELLANT'S ORIGINAL APPLICATION

Pursuant to Tennessee Rules of Appellate Proceedure 11(a), 1 and 2, Dev Kinney d/b/a Media Graphics, Appellant/Defendant/ Counter-Plaintiff submits this application to comply fully with the rules of Court proceedure. The Appellant, hereafter referred to as Defendant Dev Kinney, begs the Court's indulgence, and in support of this motion states that:

This judgment was entered in the Tennessee Court of Appeals on November 30, 1981 against Defendant Dev Kinney and comfirming the trial verdict for Kotler Exterminating Company, Appellee/Plaintiff/Counter-Defendant, hereafter referred to as Plaintiff Kotler Exterminating.

QUESTIONS PRESENTED FOR REVIEW

ISSUE I. Whether the verdicts of the jury in the suit and counter-suit were supported by the evidence.

ISSUE II. Whether the Court erred in not permitting Defendant Dev Kinney to present material evidence as to the meaning or understanding upon which the contract was based.

ISSUE III. Whether the Court erred in not permitting Defendant Dev Kinney to present material evidence of fraud and delay on the part of Plaintiff Kotler Exterminating.

ISSUE IV. Whether the Court erred in instructing the jury that Defendant Dev Kinney pleaded that time was not of the essence.

FACTS RELEVANT TO ISSUES

ISSUE I: The Record shows that the jury was totally confused about the issues. (p. 231, 4-7) The reason being that the Court allowed the oral testimony, or parole evidence of Mr. David Kotler, his employee, Mrs. Judy Durham and his advertising agent, Mr. Ralph Chandler to cloud the terms of a written contract. Parole evidence may not be introduced to vary or add to the terms of a written contract in the State of Tenness or any other State in the Union. (See Universal Commercial Code, 2-202). The contract at trial calls for Defendant Dev Kinney to provide:

> I. Services and Work Description Process Color Brochure Package with two each 2-color sales aid contracts and single-copy duplicates, multi-color warranty card, "Pest Protection Plus" theme.

The contract specifically says that Defendant Dev Kinney was to provide the theme only. The contract further states

the specific items included with the theme:

> III. Fees and Charges Comprehensive design and finished art $7260.00. Material to be camera ready for printer. $2000.00 Consignment fee to be deducted from total price.

Here again, the services that Defendant Dev Kinney was to provide, and that he specifically named in the contract as items to be paid for by Plaintiff Kotler Exterminating were a comprehensive design, AN OVERALL THEME, and the finished art for the design.

No reasonable person could, should or would expect Defendant Dev Kinney, in the advertising art business, to provide "copy", that is the particulars and intricasies in written form involving legal contracts in a business so subject to damaging legal proscecution, and so involved with scientific application as the pest control business. The word "copy" as introduced by Plaintiff Kotler Exterminating is not included in the contract.

Under Tennessee Law, the burden of proof was upon Kotler Exterminating to show that material ordered was delayed through the fault of Defendant Dev Kinney. Section IV of the contract in dispute reads:

> IV. Completion Final completion date shall be no later than March 10, 1979 from our receipt of signed acknowledgment provided, however, that should any special order material required for completion be delayed in shipment to us through no fault of our own, then completion date shall be extended accordingly.

Plaintiff Kotler Exterminating never showed during trial that all materials ordered for completion were delivered in time for completion. In fact, Defendant Dev Kinney attempted to prove otherwise and was overruled by the trial Court. (P. 84:4 - P. 86:4).

ISSUE II. If the Appellate Court and the Trial Court considered the contract ambiguous, though both Courts repeatedly said that the contract was clear, then Plaintiff Kotler Exterminating's agent, Mr. R. Chandler was within the Law in giving Parole evidence on a missing term like "copy". Defendant Dev Kinney attempted to show a written agreement, signed by Mr. Chandler, which would have cleared up any doubt on this issue. (P. 109, 5 - 7). Prior negotiations may be considered to determine real understanding of parties concerni[illegible] meaning of terms and provisions of contract. (Turner v. Zager, 363 S.W. 2d 51[illegible]0 Tenn. App. 674.) A written agreement should take preference ov[illegible] testimony of persons under obligation to the Plaintiff. Es[illegible]ly in this case, when Plaintiff Kotler Exterminating was award[illegible] $600.00 paid by R. Chandler to Defendant Dev Kinney under th[illegible] prior agreement. (P. 231, 10-15 and P.233, 12-15). This p[illegible] contract, the only unalterable peice of parole evidence, [illegible] not admitted in evidence by the Trial Court.

ISSUES III & IV. These issues clearly show that oral testimony clouded and confused the specific terms of a straightforward, written agreement. The case of Petty vs. Sloan, (Tenn) 277, S.W. 2d 355, cited by the Appellate Court (See Court of Appeals-Order, P.7) does not apply in ISSUE III. Defendant Dev Kinney is seeking to show delay and fraud by Plaintiff, not ambiguity or parole evidence. Instead, Defendant Dev Kinney would ask the Court to consider Sherman V. Southern Advertising Co.,

292 S.W. 2d 36 (Tenn, 1956) which states that a person who fails to complete a contract in time because of the act or fault of the other party is not liable for the delay. This Appellant would gladly apply the Petty vs. Sloan as well as the McGannon vs. Farrell case also cited by Appellate Court to ISSUE I in this cause.

IN CONCLUSION

May companies like Plaintiff Kotler Exterminating use people in their employ to introduce items like "copy" in trial to alter the terms of a perfectly unambiguous written contract? Did Appellate Court and Trial Court confuse biassed oral testimony with material evidence? Did the Appellate Court confuse "evidence of delay" with "parole evidence" on contract? Since Defendant Dev. Kinney's lawyer at trial, Larry B. Creson, Jr., knew he was handling his last case at bar, can Defendant be held fully responsible for overcites and misrepresentation? The Honorable Judges of the Supreme Court of the State of Tennessee have the power under Tennessee Rules of Appellate Proceedure 1 and 2, to see that the cause is reviewed and judged on its merits. This Appellant appeals to your wisdom under the Law to give full hearing to these matters.

Respectfully submitted,

John D. Kinney, Pro Se

Dev Kinney/Media Graphics, Inc.
P.O. Box 11502
Memphis, TN 38112

CERTIFICATE OF SERVICE

This is to certify that a copy fully representitive and taken from the original foregoing Application For Permission To Appeal To Complete Original Application was mailed/ delivered to opposing attorney of record at his business address, 2800 Sterick Building, Memphis, TN 38103, this being the fifteenth day of February, 1982.

John D. Kinney, Pro Se

IN THE SUPREME COURT OF THE
UNITED STATES

DEV KINNEY d/b/a MEDIA GRAPHICS Appellant	;	
	;	No. A-982
v.	;	
KOTLER EXTERMINATING COMPANY, INC. Appellee	;	

MOTION TO SUPREME COURT JUSTICE
S.D. O'CONNOR TO CONFIRM TIMELY DOCKET

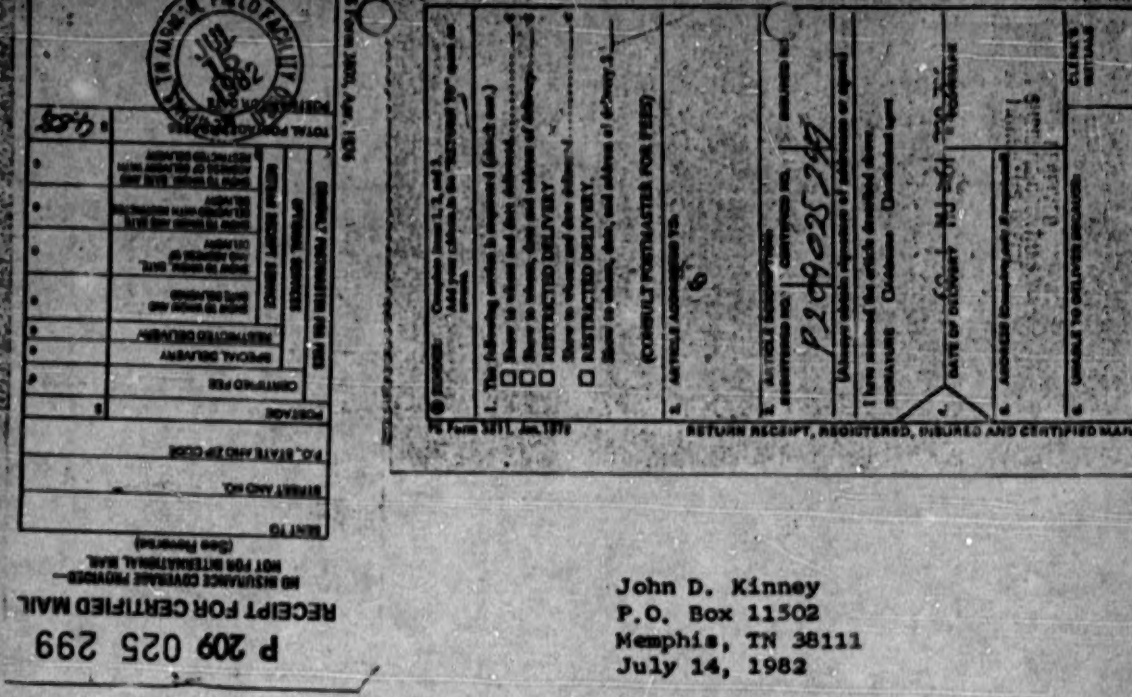
Comes now Appellant Dev Kinney d/b/a Media Graphics and pursuant to Rule 43 of the Supreme Court asks the Court to consider the attached proof of timely mailing of docket as required in order of May 17th, 1982. Mailing was by certified priority mail at 8:30 A.M. July 15th as receipts show and was to arrive July 16th as ordered. Although the documents were not received by the clerk on the 16th, Appellant was assur[illegible] that they would be in the box on the day of the 16th.

Appellant asks the Court to receive the documents as timely based on this evidence, or, in the alternative, to appoint a member of the bar to certify timely mailing pursuant to Rule 28.2 of the Supreme Court.

Appellant respectfully asks the Court to notice that the docket has been revised from the original in accordance with Rule 38.7 and that this matter be allowed to proceed.

Respectfully submitted,

John D. Kinney
Pro se P.O. BOX 11502, MPHS. TN 38112
SERVICE CERTIFIED IN APPEAL 7/31/82


RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
P 209 025 299
RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

John D. Kinney
P.O. Box 11502
Memphis, TN 38111
July 14, 1982

Office of the Clerk
Katherine Downs, Assistant
Supreme Court of the United States
of America
Washington, D.C. 20543

Dear Ms. Downs:

Please look over the enclosed material to see if everything is in order. I have submitted no Docket Fee because the case was begun while I was legally pauperized, and conditions have not changed for any appreciable amount of time since that date. I am still legally defined as a Pauper in this state. I can, however use money loaned to me for attending college if necessary.

Please call me at (901) 452-2027 if I need to do anything further.

Yours very truly,

John D. Kinney, Pro Se
Dev Kinney d/b/a Media Graphics
P.O. Box 11502
Memphis, TN 38111

Enclosures, Bound Brief for Docketing
Kinney v. Kotler A-982

82-5179

RECEIVED
AUG 17 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. A-982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1982

DEV KINNEY D/B/A MEDIA GRAPHICS
Appellant, Defendant, CounterPlaintiff

V.

KOTLER EXTERMINATING COMPANY, INC.
Appellee, Plaintiff, CounterDefendant

APPELLEE'S MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF TENNESSEE

DAVID E. CAYWOOD
PICARD, CAYWOOD, ARTHUR & TAYLOR
Suite 2800, Sterick Building
Memphis, Tennessee 38103
Attorneys for Appellee,
Kotler Exterminating Co., Inc.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF TENNESSEE

MOTION TO DISMISS

Appellee, Kotler Exterminating Co., Inc., pursuant to United States Supreme Court Rule 16.1(b),(d), 28 U.S.C., moves the Court to dismiss the Appeal herein on the following grounds:

1. The appeal does not present a substantial federal question.

2. The federal question sought to be reviewed was neither timely nor properly raised, nor expressly passed on by the Courts of the State of Tennessee.

3. The judgment of the Court of Appeals, Western Section at Jackson and the Supreme Court of the State of Tennessee rests on an adequate non-federal basis.

4. The appeal in forma pauperis is frivolous or malicious, pursuant to 28 U.S.C. 1915 (d).

STATEMENT

This suit was brought by Kotler for return of $2,000.00 paid in advance for work to be done by Kinney pursuant to terms of a contract entered into by the parties, and for $25,000.00 damages for breach of said contract.

By counter-suit Kinney sought judgment against Kotler for $2,665.50 for work done, plus attorney's fees and damages of $60,000.00.

The case was tried before the Honorable Irving M. Strauch in the Circuit Court of Tennessee for the Fifteenth Judicial Circuit at Memphis and a jury, resulting in a verdict and judgment in favor of Kotler for $2,600.00 and against Kinney in both the suit and counter-cuit. From the verdict and judgment, Kinney appealed after his Motion for a New Trial was overruled.

ISSUES APPEALLED TO TENNESSEE COURT OF APPEALS

On appeal to the Court of Appeals of Tennessee, Western Section at Jackson, Kinney raised the following issues:

> "1. Whether the verdicts of the jury in the suit and counter-suit were supported by the evidence.
> 2. Whether the Court erred in not permitting Defendant/Counter-Plaintiff (Kinney) to present material evidence as to the meaning or understanding upon which the contract was based.
> 3. Whether the Court erred in not permitting Defendant/Counter-Plaintiff (Kinney) to material evidence of fraud and delay on t of Plaintiff/Counter-Defendant.
> 4. Whether the Court erred in instructing the jur that Defendant/Counter-Plaintiff (Kinney) pled at time was not of the essence.

The Tennessee Court of Appeals affirmed the judgment of Trial Court on all issues on November 30, 1981.

On Appeal to the Supreme Court of Tennessee at Jac ., Kinney raised the identical issues reviewed in the Court of Appeals. Upon consideration of the Application for Permission to Appeal of Kinney, the Answer of Kotler, the opinion of the Court of Appeals and the record in the cause, [on Febru 16, 1982] the Supreme Court of Tennessee in a Per Curiam opinion denied permission to appeal.

QUESTIONS PRESENTED

Whether a State Court of Appeals is bound to uphold a jury verdict resulting from deliberate tort by a municipality within that state, quoting U.S. Constitutional Amendments V and XIV due process clauses. (Emphasis added.)

ARGUMENT

Appellant, Kinney first raises the question presented above in his appeal to the Supreme Court of the United States. He did not raise this issue in the Tennessee Court of Appeals nor in the Supreme Court of Tennessee; thus, the issue was not expressly passed on due to Kinney's failure to properly and timely raise the issue. Therefore, U.S. Supreme Court Rule 16. 1 (b), 28 U.S.C. is applicable and Kotler asks for dismissal on this ground.

In his jurisdictional statement to this Court, Kinney cites Articles V and XIV of the United States Constitution for the first time in this cause. At no time prior to this did Kinney raise these issues. As stated above, the questions on appeal in the Tennessee Court of Appeals and the Supreme Court of Tennessee involved presentment and support of evidence and jury instructions, all of which the Courts below resolved in favor of Kotler. Kinney has here for the first time raised a different issue regarding a deliberate tort by a municipality which never came up at trial or on appeal to the States Courts. At page 4 of his jurisdictional statement to the Court, Kinney states that in a Memorandum filed January 30, 1982 (attached) he "again raised the federal question of due process of law." The text of the Memorandum admits that only after trial did his attorney withdraw from the case. Therefore the only possible due process issue -right to counsel- is satisfied. The only other issues raised in this memo are judicial error questions which were sufficiently resolved by the Appellate Courts below. Thus, it is evident that Kinney has only raised Articles V and XIV of the United States Constitution issues in order to satisfy the jurisdictional statement requirements of U.S. Supreme Court Rules 15.1 (e) (iii), and (f). An Order to Dismiss is proper under these circumstances.

In addition to the reasoning that Kinney only raised questions of evidence and jury instruction below, Kotler further relies on U.S. Supreme Court Rules 16.1 (b) that the Court may dismiss on grounds that the judgment rests on an adequate non-federal basis.

As to issue number one (1), "whether there was evidence to support the Jury Verdict," the Court of Appeals held that "where there is no error of law, we cannot disturb the verdict if there is any material evidence to support it," citing City of Columbia v. Lentz, 39 Tenn. App. 350, 282

S.W.2d 787; also Rose Co. v. Snyder, 185 Tenn. 499, 206 S.W.2d 897 and stating there were many cases in support.

In its ruling on issue number two (2), "whether the Trial Judge erred in not permitting Kinney to present evidence as to the meaning or understanding upon which the contract was based," the Court of Appeals held the law is well settled in Tennessee that unless the language of the written agreement is ambiguous, testimony may not be introduced to change, explain or vary the terms thereof. The Court went on to state that the contract involved in the case is expressed in plain and unambiguous language and the Court found no error in the action of the Trial Court with respect to this issue.

The Court found that issue number three (3), "whether the Trial Judge was in error in not permitting Defendant to introduce proof of fraud and delay on the part of Kotler," was thoroughly explored at the trial by Kinney's own testimony and one of his witnesses. The Court held that Kotler's responsibilities were set forth in the written agreement, and the attempt by Kinney to go outside the contract and impose duties on Kotler not imposed by the agreement were properly denied by the Trial Court and the Court of Appeals, therefore, found no error as to issue number three.

It its review of issue number four (4), "whether the Court erred in instructing the jury that Kinney pleaded that time was not of the essence," the Court of Appeals considered the position taken by Kinney at the trial along with the pleadings and concluded he was maintaining that time was not of the essence and even if the instructions complained of were incorrect, it was, at most, harmless error. Further the Court found that Kinney did not make a special request for clarification nor did he make any objection to the charge at the trial or at his Motion for a New Trial.

Therefore, Kotler asserts that all of the issues raised on appeal below are not substantial federal questions and were decided on adequate non-federal basis. Kotler again asserts that an Order to Dismiss is proper in this course.

Kotler further prays that the Court dismiss this appeal pursuant to 28 U.S.C. 1915 (d):

> "Proceedings in forma pauperis: The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

Kotler couples with this a reference to U.S. Supreme Court Rule 16.1 (d):

> "The Court will receive a Motion to Dismiss or Affirm on any other ground the Appellee wishes to present as a reason why the Court should not set the case for argument."

The underlying reason for 28 U.S.C. 1915 (d) is to prevent abuse of the Court system. See, Tyler v. Callahan (E.D. Mo.), 74 F.R.D. 421, aff'd without op. (C.A. Mo.) 573 F.2d 1313, cert den., 436 U.S. 947. Various tests for finding an appeal frivolous include "essentially equivalent to rediculous," "an action lacking in arguable merit," having no realistic chance of success," "lacking in substantiality", or "making no rational argument on the law or facts." See, 32 Am Jur 2d § 243. This action meets most if not all of these tests and Kotler here prays that this Court order this Appeal dismissed pursuant to 28 U.S.C. 1915 (d) and U.S. Supreme Court Rule 16.1 (d).

CONCLUSION

WHEREFORE, premises considered, Appellee Kotler prays that this Court dismiss this Appeal on the grounds that Appellant did not properly or timely raise substantial federal questions, that Appellant's issues raised below were resolved by the Court of Appeals, Western Section at Jackson and the Supreme

Court of Tennessee on adequate non-federal basis, and that the appeal is frivolous.

David E. Caywood

DAVID E. CAYWOOD,
PICARD, CAYWOOD, ARTHUR & TAYLOR
Attorneys for Appellee,
Kotler Exterminating Co., Inc.

CERTIFICATE OF SERVICE

I, David E. Caywood, do hereby certify that three copies of the foregoing Motion has been mailed, U.S. Mail, postage prepaid to Mr. John Kinney, 717 Spring Street, P.O. Box 11502, Memphis, Tenn. 38112, this the 13th day of August, 1982.

David E. Caywood

DAVID E. CAYWOOD

distributed
OCT 27 PAGE 5

ORIGINAL

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SUPREME COURT, U.S.

NO. 82-5179

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1982

DEV KINNEY d/b/a/ MEDIA GRAPHICS
Appellant, Defendant, CounterPlaintiff

V.

KOTLER EXTERMINATING COMPANY, INC.
Appellee, Plaintiff, CounterDefendant

APPELLANT'S ANSWER TO THE MOTION TO DISMISS APPEAL FROM SUPREME COURT OF TENNESSEE

JOHN D. KINNEY, pro se
MEDIA GRAPHICS
717 SPRING STREET
MEMPHIS, TN 38112

10

ANSWER TO
APPELLEE"S MOTION TO DISMISS APPEAL
FROM THE SUPREME COURT OF TENNESSEE

Appellant, Dev Kinney d/b/a/ Media Graphics, asks the Honorable Judges of the United States Supreme Court to hear this answer so that Appellee's motion to dismiss may be denied. Appellee Kotler Exterminating has four objections, each of which will be repeated and answered in turn.

1. The appeal does not present a substantial federal question.

The federal question of fraud against contract in violation of section 2-201 of the Uniform Commercial Code was put to the fifteenth circuit court in paragraph 10 of Appellant Kinney's Answer to Kotler Exterminating Company's original Complaint and paragraph 4 of the Counterclaim:

> (Answer, trial level)
> 10. Defendant...alleges that plaintiff did not wish for defendant to meet the time schedule of the contract.
>
> (Counterclaim, trial level)
> 4. That plaintiff did willfully and with malice aforethought attempt to hender the counterclaimant in the specific performance of Contract B...

Paragraph 3 of the Counterclaim and paragraph 3 of the original Answer by Kinney indicate that two contracts were involved in the negotiations:

> (Counterclaim, trial level)
> 3. That, as previously alleged in Answer... the Contract A...makes counterclaimant sole agent for the production of all material resulting from preliminary work done under the terms of Contract A, and that Contract B...was effected from said preliminary work and concepts.

The fact that Kinney was unable to find counsel in this matter and that when he did find counsel, counsel was unable or unwilling to try the case or represent Kinney on the merits

was put to the Tennessee Court of Appeals and the Tennessee Supreme Court. This fact is also stated in the questions presented for review by implication. In Powell v. Alabama, 287 U.S. 45 pp 67, 68, it is shown that justice is denied when "man in truth, though not in form, is denied counsel."

2. The Federal Question sought to be reviewed was neither timely nor properly raised, nor expressly passed on by the courts of Tennessee.

Articles V and XIV of the U.S. Constitution are expressed in specific terms in the four questions presented for review. Where there is a contract, real property is involved, whether tangible or intangible. The value of this property was determined to be over $7,200.00 plus all rights to additional production, which could mean many thousands more. This value is specifically stated in contracts A and B.

The fact that Kinney's original answer had to be filed pro se indicates that he was denied counsel until time of trial. The Appeal Courts of Tennessee were aware that counsel withdrew immediately after trial. The Appeal courts of Tennessee were made aware by appellant Kinney that a discrepancy in the events of the trial, counsel's motion for a new trial and the transcribed record existed and that Appellant Kinney's civil rights under the constitution were violated.

The U.S. Government, as Parens Patria, has the obligation to protect the civil rights of all citizens, whether those rights are violated by a single party or a subordinate government. It is appellant Kinney's contention before this Court that Rule 11(b) of the Tennessee Court of Appeals allows the Courts of Tennessee to violate a citizens right to appeal by denying application and refusing to record the facts for review by the Supreme Court of the United States.

3. The judgment of the Court of Appeals, Western Section at Jackson and the Supreme Court of the State of Tennessee rests on an adequate non-federal basis.

Appellant Kinney seeks to have the Supreme Court of this land review whether he was in truth denied counsel, whether the jury at trial was presented all the facts in a manner that would lead to a just verdict, and whether it should have been apparent to the Supreme Courts of Tennessee that a just trial was not afforded Appellant Kinney under his rights according to Articles V and XIV of the Amendments to the U.S. Constitution, and finally, if in fact Appellants rights were denied, does the Supreme Court of Tennessee have the right to deny Application to Appeal when Kinney is not and has not been truly and justly represented before the law.

4. The Appeal in Forma Pauperis is frivolous or malicious, persuant to 28 U.S.C. 1915(d).

Appellant denies this allegation, and considers it as slandor on the part of Appellee.

CONCLUSION

Now that all objections to this cause by Appellee Kotler Exterminating Company have been answered to the best of my ability acting pro se for myself, Dev Kinney, the sole owner of Media Graphics, and a law abiding and tax contributing member of Tennessee for over 20 years, Appellant Kinney asks the Court to deny the motion to dismiss and give full hearing to this case.

Respectfully submitted this
29th day of September, 1982.

John D. Kinney

John D. Kinney, pro se
717 Spring St.
Memphis, TN 38112

CERTIFICATE OF SERVICE

The following is to certify that 3 copies of this answer to Appellee's motion to dismiss appeal have been mailed to counsel of record David E. Caywood, 2800 Sterick Building, Memphis, Tennessee 38103 on this the 29th day of September.

John D. Kinney, pro se
Dev Kinney/Media Graphi

NO. 82-5179

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1982

DEV KINNEY d/b/a/ MEDIA GRAPHICS
Appellant, Defendant, CounterPlaintiff

V.

KOTLER EXTERMINATING COMPANY, INC.
Appellee, Plaintiff, CounterDefendant

APPELLANT'S ANSWER TO THE
MOTION TO DISMISS APPEAL FROM SUPREME
COURT OF TENNESSEE

JOHN D. KINNEY, PRO SE
MEDIA GRAPHICS
717 SPRING STREET
MEMPHIS, TN 38112

ORIGINAL

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APPELLEE"S MOTION TO DISMISS APPEAL
FROM THE SUPREME COURT OF TENNESSEE

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Respectfully submitted this
29th day of September, 1982.

John D. Kinney

John D. Kinney, pro se
717 Spring St.
Memphis, TN 38112